

SWANCC DECISION

An Overview

**Ninth Regional Wetlands and
Water Resources Meeting**

Kansas City, Missouri

April 2, 2002



CWA Jurisdiction

- 1972 CWA defined “navigable waters” as “waters of the United States”
- 1977 CWA reauthorization recognized broad jurisdiction over wetlands and added flexibility in § 404(f)
- *Riverside Bayview*: protection for adjacent wetlands as part of the broader aquatic ecosystem



CWA Regulations

- **Waters used in interstate or foreign commerce**
- **Interstate waters**
- **Intrastate lakes, rivers, streams, wetlands the use, degradation or destruction of which could affect interstate commerce**
- **Impoundments of waters of the U.S**
- **Tributaries of above waters**
- **Territorial sea**
- **Wetlands adjacent to above waters**




SWANCC Decision

- **Illinois case involving landfill siting in manmade ponds used by migratory birds**
 - **Statutory issue (CWA authority)**
 - **Constitutional issue (commerce clause)**
 - **Not reached by court**
- **January 9, 2001: Regulation of isolated, intrastate, nonnavigable waters based solely use as habitat by migratory birds exceeds CWA authority**



Implications of *SWANCC*

- Impacts are still being assessed, but are potentially significant
 - Some estimate as much as 20% of Nation's wetlands are at risk
 - Even if *SWANCC* were to cause loss of only 1% of wetlands, more wetlands would be destroyed than were lost in the past decade
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State Law Protection of Isolated Wetlands



Source: Ducks Unlimited: *The SWANCC Decision: Implications for Wetlands and Waterfowl* Final Report. September 2001

Available on line at: http://www.ducks.org/conservation/404_report.asp




Jan. 19, 2001 Legal Memo

- **Joint Corps/EPA memo interprets legal implications of *SWANCC***
- **Clarifies that decision affects all CWA programs involving “waters of the U.S.” (e.g., 404, 402, 311)**
- **Identifies waters with jurisdictional status unchanged, waters no longer jurisdictional, waters which require case-by-case determination (i.e. isolated waters)**



Legal Memo [Continued]

- **Waters Unaffected by *SWANCC***
 - Waters used in interstate commerce
 - Interstate waters
 - Impoundments of jurisdictional waters
 - Tributaries to jurisdictional waters
 - Territorial seas
 - Wetlands adjacent to jurisdictional waters
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Legal Memo [Continued]

- No longer jurisdictional:
 - Isolated intrastate non-navigable waters, with use by migratory birds as only basis for CWA jurisdiction
- Case-by-case jurisdictional determination
 - Isolated intrastate waters that might have other bases for asserting jurisdiction (links to commerce or to “waters of the U.S.”)




SWANCC Issues

- **Navigation as a valid basis for isolated waters jurisdiction (e.g., Great Salt Lake)**
- **Although unaffected by SWANCC, issues related to tributary or adjacent status now take on added importance**
 - **What factors are relevant to establishing adjacency?**
 - **What factors are relevant to establishing tributary status?**



Post-SWANCC Developments

- Focus of judicial decisions has been on tributary/adjacency issues
 - *Headwaters*, 243 F.3d 526 (9th Cir. 2001)
 - Indicates SWANCC narrowly focused on isolated waters, and that Federal court decisions finding CWA jurisdiction over tributaries is undisturbed by SWANCC
 - Held that man-made irrigation canals which received water from natural streams and lakes, and diverted water to natural streams and creeks, even intermittently, are waters of the US as part of the overall tributary system
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Post-SWANCC [Cont]

Rice, 250 F.3d 264 (5th Cir. 2001)

- Broad interpretation of *SWANCC* as limiting CWA jurisdiction to waters adjacent to actually navigable waters
 - OPA case involving discharge of oil to dry land, which eventually reached ground water and then potentially could reach surface waters through gradual seepage
- Subsequent government briefs' views on *Rice*:
 - Discussion is non-binding *dicta*
 - Incorrectly analyzed *SWANCC* and *Riverside Bayview*



Likely Next Steps

- **Additional Guidance**
- **Evaluation of Need for Rulemaking**
- **Society of Wetland Scientists Seminar**
- **Grants**
- **National Governors Association Dialogue**
- **Farm Bill Reauthorization**



Conclusions

- *SWANCC* eliminated CWA jurisdiction over isolated intrastate nonnavigable waters based solely on use as migratory bird habitat
- Case law still unfolding but trend appears to take narrow reading of *SWANCC* and find jurisdiction over tributaries/adjacent wetlands unaffected, although this is not universal view
- States will need to play increasingly important role in protection isolated waters

